

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT
AND JOINT APPENDIX**

823

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA *United States Court of Appeals
for the District of Columbia*

No. 9831

FILED MAY 25 1948

Joseph W. Starnes
CLERK

ETHEL V. LANSTON, *Appellant,*

v,

ERVIN SCHWARTZ, *Appellee.*

**Appeal from the District Court of the United States for the
District of Columbia.**

MARK P. FRIEDLANDER,

LEROY A. BRILL.

839 15th St., N. W.,

Washington 6, D. C.,

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INDEX.

	Page
Jurisdictional Statement	1
Statement of the Case	2
Statutes Involved	4
Statement of Points	5
I. Ruling as to prima facie case	5
II. Direction of verdict on undue influence.....	6
Summary of Argument	6
As to Point I	6
As to Point II	7
Argument	7
I. Competency of Testator must be shown in proponent's prima facie case	7
II. Undue influence was for jury	10
Conclusion	12

TABLE OF CASES.

Barber's Appeal, 63 Conn. 393, 27 At. 973.....	9, 12
Brosnan v. Brosnan, 263 U. S. 345, 68 L. Ed. 332.....	8
Credille v. Credille, 123 Ga. 673, 51 S. E. 628.....	9
Cole's Will, 49 Wis. 179, 5 N. W. 346	9
Dial v. Walker, 332 Ill. 509, 163 N. E. 772.....	9
Duckett v. Duckett, 77 App. D. C. 303	10
Evans v. Arnold, 52 Ga. 169	9
Frene et als. v. Muratori et al., 79 U. S. App. D. C. 101, 142 Fed. (2d) 768	10
In Re Gedney, 142 N. Y. S. 157	9
Hagerty v. Olmstead, 39 App. D. C. 175.....	10
Re Hanson, 50 Utah 207, 167 P. 256	9
Hutchins v. Hutchins, 41 App. D. C. 367.....	9
Kingsley v. Blanchard, 66 Barb. (N. Y.) 317.....	9
Knox's Appeal, 26 Conn. 20	9
Lipphard v. Humphrey, 28 App. D. C. 355.....	9

	Page
Mayo v. Jones, 78 N. C. 402	9
National Safe Deposit, etc. v. Heiberger, 19 App. D. C. 506	9, 10
Nelson v. Dohoney, 58 App. D. C. 339	10
Renn v. Samos, 33 Tex. 760	9
In Re Shaul, 158 App. Div. 348, 143 N. Y. S. 433.....	9
Seebrook v. Fedawa, 30 Neb. 424, 46 N. W. 650.....	9
Silverthorn's Will, 68 Wisc. 372, 33 N. W. 287.....	9
Weaver v. Allison, 340 N. W. 815, 102 S. W. (2d) 884..	9
Wood v. Wood, 25 Wyo. 26, 164 Pac. 844	9

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No. 9831.

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v.

ERVIN SCHWARTZ, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

(a) The District Court, holding Probate Term, had jurisdiction of this caveat proceeding.—D. C. Code (1940), Title 11-501, 503 (31 Stat. 1208, ch. 854, secs. 116, 117); Title 19-312 (31 Stat. 1213, ch. 854, sec. 140, as amended).

This Court has jurisdiction of the appeal.—D. C. Code (1940), Title 17-101 (31 Stat. 1225, ch. 854, sec. 226, as amended).

(b) Appellant, Ethel V. Lanston, as the widow of Aubrey Lanston, filed, in the Probate Branch of the District Court, a caveat to Lanston's will executed December 5, 1940 (App. 2). The answer of Ervin Schwartz, Appellee, who was the sole beneficiary under the will, prayed for a decree admitting the will to probate (App. 4). Issues were framed on the caveat (App. 5), and the parties aligned by order of the District Court (App. 6) as follows: Caveator, Ethel V. Lanston, as Plaintiff; and the Caveatee, Ervin Schwartz as Defendant.

Trial by jury was had upon depositions of foreign witnesses and oral testimony. At the conclusion of all the evidence the Court directed a verdict upholding the will (Tr. 131). From the final decree admitting the will to probate (App. 6) the Caveator, Ethel V. Lanston, noted this appeal (Tr. 159).

STATEMENT OF THE CASE.

This is an appeal from a final decree admitting the will of Aubrey Lanston to probate and record in a caveat proceeding instituted by his widow, who is the Appellant.

Aubrey Lanston was the son of Beattie Lanston and Tolbert Lanston, and although a citizen of the United States throughout his life, he lived in Europe from about 1922 until his reported death in 1942 (Tr. 148). He left his wife and two children in America, but corresponded with his wife and was friendly with her and his family (Tr. 117). The last few years of his life he lived in Budapest, Hungary, receiving an income from the estate of his father and a small amount from the trust estate of his mother (Tr. 148). Under his mother's will, in addition to the income from her estate, Aubrey Lanston was given a power of appointment by will over the remainder of the trust fund. The balance of this trust, some \$8,000.00 in cash and securities, held by the American Security and Trust Company, is the bone of contention.

Aubrey Lanston was in ill health during the last few years of his life, and when the political situation in Hun-

gary, due to the expansion of the Nazis, became tense, all American nationals were advised to leave. Aubrey Lanston refused to leave (App. 24, 25).

At the beginning of 1940 he was subjected to an order of expulsion, which had been extended until November of 1940. Despite the expulsion order and trouble with the police, Mr. Lanston remained in Budapest (App. 25). Towards the end of 1940 (App. 24) Mr. Lanston moved to the home of a Budapest resident, Mrs. Schwartz (App. 20, 21). Mrs. Schwartz appeared from time to time with Lanston at the American Legation in Budapest, and her son, Ervin Schwartz, was also seen there in the company of Mr. Lanston (Tr. 48); and a Mr. Schwartz, an uncle, also sometimes appeared (App. 25).

On December 5, 1940, Lanston went to the American Legation in Budapest, presented a will, and requested that it be witnessed (App. 12). At first the witnesses did not want to sign as such, but upon Mr. Lanston's insistence, they agreed to so act (App. 12, 17). Thus, Ernest Polutnik and Mrs. Elizabeth Gál became attesting witnesses to the will, but Mrs. Gál was definitely under the impression that Aubrey Lanston at that time was not of sound mind (App. 18), and Mr. Polutnik was of the opinion that he was not entirely normal (App. 13).

At the time of the execution of the will, Lanston owed nothing to the Schwartz family (App. 22, 23) but by this will Aubrey Lanston exercised his right of disposition over the remainder of his mother's estate in favor of Ervin Schwartz, a fifteen-year-old boy (Tr. 84). Mr. Lanston gave the original will to the mother of Schwartz (App. 20). Lanston had no other property at that time except this power of appointment.

In September of 1941 Mr. Lanston, with no stated reason, took this will to one of the American Vice Consuls and had the same acknowledged (Tr. 83). Very shortly after this Lanston was placed in a "detention house" (App. 22). Thereafter he was reported to have died in this "detention house", and was buried in a Jewish cemetery (App. 24).

although he was not Jewish. The records (Tr. 144) indicate that Lanston's death was reported within the 48-hour period after the American Legation moved out of Budapest (Tr. 15).

The widow filed a petition for caveat of the will. This petition was answered by the two children of the decedent and by Ervin Schwartz, the Caveatee. In his answer Schwartz prayed for probate of Lanston's will of December 5, 1940. Issues were framed and the parties aligned. No special issue as to testamentary capacity was included in the framed issues. They included the question of whether or not the paper writing was the last will and testament of Aubrey Lanston, deceased, and whether the paper writing was duly executed and attested as required by law. Issues of duress and undue influence were also framed (App. 5, 6).

The case was tried to a jury, and at the conclusion of the prima facie case of Caveatee, the Caveator moved the Court to deny the will probate on the ground that the Caveatee had failed to prove the mental competency of the testator, and on the contrary had, by the attesting witnesses, proved the mental incompetency of the testator. This motion was overruled, the will was admitted over caveator's objection, and at the conclusion of all the testimony the Court directed a verdict sustaining the will. The widow (caveator) appeals from the decree entered upon the directed verdict.

STATUTES INVOLVED.

Title 19, D. C. Code (1940):

"Section 101. **Capacity To Make Will.**—No will, testament, or codicil shall be good or effectual for any purpose whatever unless the person making the same be, if a male, of the full age of 21 years, and if a female, the full age of 18 years, and be at the time of executing or acknowledging it, as hereinafter directed, of sound and disposing mind and capable of executing a valid deed or contract. (Mar. 3, 1901, 31 Stat. 1433, ch. 854, sec. 1625)"

* * * * *

“Section 103. Form of Will—Witnesses—Alteration—Revocation.—All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; . . .”

* * * * *

“Section 305. Proof of Will—Production of Witnesses.—On the day appointed as aforesaid, or such day as the court may appoint, due proof of such publication and mailing being made, the court shall proceed to take proof of the will. All the witnesses to such will who are within the District and competent to testify must be produced and examined, or the absence of any of them satisfactorily accounted for.”

“Section 306 . . . If all such witnesses shall be out of the United States then it will be sufficient to take the testimony of such of them as the court may require, and to prove the signature or signatures of the others.

“The testimony of such witnesses out of the District to be taken hereunder shall be under a commission issued by the court to one or more competent persons, and in such case the original will or codicil shall accompany the commissions and be exhibited to the witnesses.

“No notice need be given of the time and place of taking such testimony, *unless in a case in which probate is opposed.*” (Emphasis supplied)

* * * * *

“Section 308. Admission to Probate.—If, *upon hearing the proofs submitted*, the court shall be of opinion that the will was duly executed *and the testator was competent to execute the same*, and no caveat shall be filed against the admission of the same to probate, the court shall decree that the said will be admitted to probate and record.” (Emphasis supplied)

STATEMENT OF POINTS.

I.

The Court erred in refusing to rule that the proponent of the will, in his prima facie case, must offer proof of the mental competency of the testator.

II.

The Court erred in directing a verdict in favor of the Caveatee upon the issue of undue influence.

SUMMARY OF ARGUMENT.

I.

By virtue of the provisions of Title 19, Section 308, D. C. Code (1940), before the Probate Court may admit a will to probate, proof must be submitted that "the will was duly executed and the testator was competent to execute the same . . .". Under the probate practice which has been in continuous effect in this jurisdiction for over forty years, and under the provisions of the foregoing section of the Code, as read and construed together with Section 101 of Title 19 ("Capacity To Make A Will"), the proponent of a will in a caveat proceeding, as a part of his prima facie case, must submit proof of the testator's age and testamentary capacity, in addition to proof of formal execution. In this proceeding there was proof of age and formal execution of the will; however, not only was there a failure of proof of testamentary capacity in the proponent's prima facie case, but there was affirmative evidence by one of the attesting witnesses to the will that the testator, at the time he executed the will, was of unsound mind; and by the other attesting witness, that he did not believe the testator was normal in all respects; and by a third witness, who observed the testator many times, that he was mentally and physically ill.

The Court did not pass upon the testamentary capacity of the testator, nor was such question submitted to the jury. Therefore, the Court erred in either, (1) failing to deny the will to probate upon the Caveatee's own evidence; or (2) failing to submit the issue of testamentary capacity to the jury under the Court's own instruction. The Court relied on the general presumption of sanity, but Appellant says that this presumption does not overcome the require-

ments of the District of Columbia Code, and even if it did, still the presumption was overthrown (or at least evenly met) by the admission in evidence of affirmative proof of the testator's mental incompetency at the time he executed the will.

II.

On the issue of undue influence, evidence of the physical and mental condition of the testator, together with circumstances giving rise to the opportunity of the beneficiary's mother to exercise undue influence; the unnatural provisions of the will, excluding the widow, son and daughter of the decedent; the fact that the testator was placed in a detention house immediately after he acknowledged the will; and his death reported within forty-eight hours after the American Legation left Budapest;—was sufficient to require submission to the jury on this issue.

ARGUMENT

I.

The Court erred in refusing to rule that the proponent of the will, in his prima facie case, must offer proof of the mental competency of the testator:

In the case at bar the testator was living abroad when he made his will. One of the attesting witnesses was a Hungarian national in the employ of the American Legation, and the other was an American Vice Consul. Their depositions were first taken by the Caveatee, and they were questioned as to the age of the testator and his execution of the instrument. **No questions were asked testing testamentary capacity.**

After these depositions of the attesting witnesses were taken, there came to the attention of the Caveator the fact that both attesting witnesses had made statements to the State Department, which was acting in the matter for the Alien Property Custodian, (Gál (Tr. 141) and Polutnik (Tr.

32) statements; (App. 11-15; 19)). These statements indicated that one of the attesting witnesses thought that the testator lacked testamentary capacity. The other attesting witness was under the impression that the testator was not normal in all respects. As a result of motions made and argued, additional questions were put to the attesting witnesses. These questions and answers were offered in the prima facie case of the proponent of the will.

The three requisites of a valid will are:

(a) The will must be in writing and executed by the testator in the presence of two attesting witnesses [D. C. Code (1940), 19-103].

Proof of compliance with this requirement is clearly indicated in the record.

(b) Testator must have been of age [19-101].

The record clearly shows compliance with this requirement.

(c) The testator must have had testamentary capacity (19-101).

This requirement was not met, as no evidence was offered in the prima facie case or otherwise to prove that the testator, at the time he executed the will, was "of sound and disposing mind and capable of executing a valid deed or contract."

1. To escape the result of such failure, proponent of the will relied upon the presumption of sanity, and cited the case of *Brosnan v. Brosnan*, 263 U. S. 345, 68 Law Ed. 332. The *Brosnan* case is compelling authority for the one rule of law in will cases, namely, that on a framed issue of sanity in a will contest, the burden of proof is upon the caveator and not the caveatee.

However, the Supreme Court, in its *obiter dictum*, inferred that the presumption of sanity might be sufficient to establish a prima facie case in favor of the proponent of a will. No attempt was made by the Supreme Court,

however, to apply or consider Section 308 of Title 19 of the D. C. Code.

The position of the Appellant is predicated, not only on the words of that statute, but also on the decisions of this Court in the following cases: *Lipphard v. Humphrey*, 28 App. D. C. 355; *Hutchins v. Hutchins*, 41 App. D. C. 367; and also compare *National Safe Deposit Savings and Trust Company v. Heiberger*, 19 App. D. C. 506, where the inverse of this proposition is approved. In other jurisdictions with similar statutory requirements, the decisions support Appellant's position: *Knox's Appeal*, 26 Conn. 20; *Evans v. Arnold*, 52 Ga. 169; *Credille v. Credille*, 123 Ga. 673; 51 S. E. 628; *Barber's Appeal*, 63 Conn. 393, 27 At. 973, 22 L. R. A. 90; *Dial v. Walker*, (1928) 332 Ill. 509, 163 N. E. 772; *Weaver v. Allison* (1937) 340 Mo. 815, 102 S. W. (2d.) 884; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Kingsley v. Blanchard*, 66 Barb. (N. Y.) 317; *In Re Gedney*, 142 N. Y. S. 157; *In Re Shaul*, 158 App. Div. 348, 143 N. Y. S. 433; *Mayo v. Jones*, 78 N. C. 402; *Renn v. Samos*, 33 Tex. 760; *Cole's Will*, 49 Wisc. 179, 5 N. W. 346; *Silverthorn's Will*, 68 Wisc. 372, 32 N. W. 287; *Wood v. Wood* (1917), 25 Wyo. 26, 164 Pac. 844; and *Re Hanson*, 50 Utah 207, 167 Pac. 256.

The normal application of reason renders further argument unnecessary, for if the Congress had intended that the Probate Court might be satisfied with presumptive proof, it certainly would never have been guilty of the folly of requiring a fact to be proven which the law presumed to exist.

The history of the Probate Court, for many years, proves that attesting witnesses have always been required to prove testamentary capacity as well as due execution. The long and continuous practice, in itself, establishes the law.

2. Should the reasoning of Appellant be in error in the foregoing argument, still we urge that there could be no presumption strong enough to outweigh the affirmative evidence of the unsoundness of mind of the testator. In

the prima facie case the testimony of the two attesting witnesses was offered. Elizabeth Gál's testimony (App. 17-19) definitely proved Lanston, the testator, to be of unsound mind. Ernest Polutnik's testimony (App. 13) proved that he was not normal in all respects. Another, non-attesting witness, Travers, said he was physically and mentally ill (App. 27).

If the presumption was strong enough to establish a prima facie case, such presumption certainly was not strong enough to overcome the affirmative evidence of unsound mind. *No one definitely said the testator was sane.* Therefore, WE CONTENTED BELOW AND CONTEND NOW THAT THE COURT'S DUTY WAS TO DENY PROBATE OF THE WILL OR SUBMIT TO THE JURY, ON THE COURT'S OWN INTERROGATORY OR ISSUE, THE QUESTION OF THE MENTAL COMPETENCY OF THE TESTATOR, citing *National Safe Deposit Savings and Trust Company v. Heiberger, supra.*

II.

Under the facts, the issue of undue influence, although not supported by any direct evidence, should have been submitted to the jury for determination:

As said by this Court in *Frene et als v. Muratori et al*, 79 U. S. App. D. C. 101, 142 Fed. (2d.) 768:

"There is no clear evidence in the record of undue influence. There is, however, strong and very persuasive evidence of fraud. That issue should have been submitted. . . ."

The words of this Court, as indicated above, apply with equal truth to the case at bar. Appellant also cites, in support of her position, the following decisions: *Duckett et al v. Duckett*, 77 U. S. App. D. C. 303; *Hagerty v. Olmstead*, 39 App. D. C. 175; and *Nelson et al v. Dohoney et al*, 58 App. D. C. 339.

Briefly stated, the salient features of this phase of the case are as follows:

1. Testator was under an order to leave Hungary in November, 1940.

2. He did not desire to leave Hungary.

3. He was feeble and in ill health, physically and mentally.

4. The Schwartz family took him into their home the last of 1940.

5. On December 5, 1940, he went to the American Legation with a will to have it witnessed.

6. He gave the will, after it was executed, to the mother of the fifteen-year-old boy who was to take under the will.

7. His reason, as testified to by the boy, for making the boy his heir, was that the fifteen-year-old boy had handled his *business* for him.

8. Testator was not engaged in any business.

9. In September, 1941, the will was acknowledged at the Legation.

10. Shortly thereafter testator was placed in a "detention house".

11. The death of the testator was *reported* within forty-eight hours after the American Legation had left Budapest.

12. Lanston, the testator, was reported to have been buried in a Jewish cemetery, although he was not a Jew.

Undue influence is nearly always a matter of inference, and particularly so in this case, where the location and the timing of the events made the gathering of direct evidence an impossibility.

CONCLUSION.

The statutory requirements of the District of Columbia, and the history of the Probate Court's requirement of evidence from attesting witnesses as to mental competency, clearly point out, we think, that the Court erred in refusing to compel proponent of the will to make out a proper prima facie case. Even presuming that there is such a presumption of sanity as would make unnecessary the proof required by the statute, yet it is definitely true that in the prima facie case the testimony of the two attesting witnesses proved lack of testamentary capacity on the part of the testator. As was so well said in *Barber's Appeal*, *supra.*:

"The statute provides that all persons of a certain age and of sound mind may make wills. It is therefore incumbent on the proponents to prove that the alleged testator was of sound mind. But the law presumes every person to be so until the contrary is shown, and this presumption is of probative force in favor of the proponents of the will. *It would be sufficient, in the first instance, were it not that . . . the practice has grown up and become law of requiring the presence in court of such of the attesting witnesses as are within reach of the process of the court, and evidence from some or all of them in reference to capacity. They are 'the persons whom the law, in its wisdom, has provided should be placed about the testator at the time and place of the execution of the will in order that they may have means and opportunity of judging his capacity, and may protect both the testator and the heirs.'*" (Italics supplied)

Respectfully submitted,

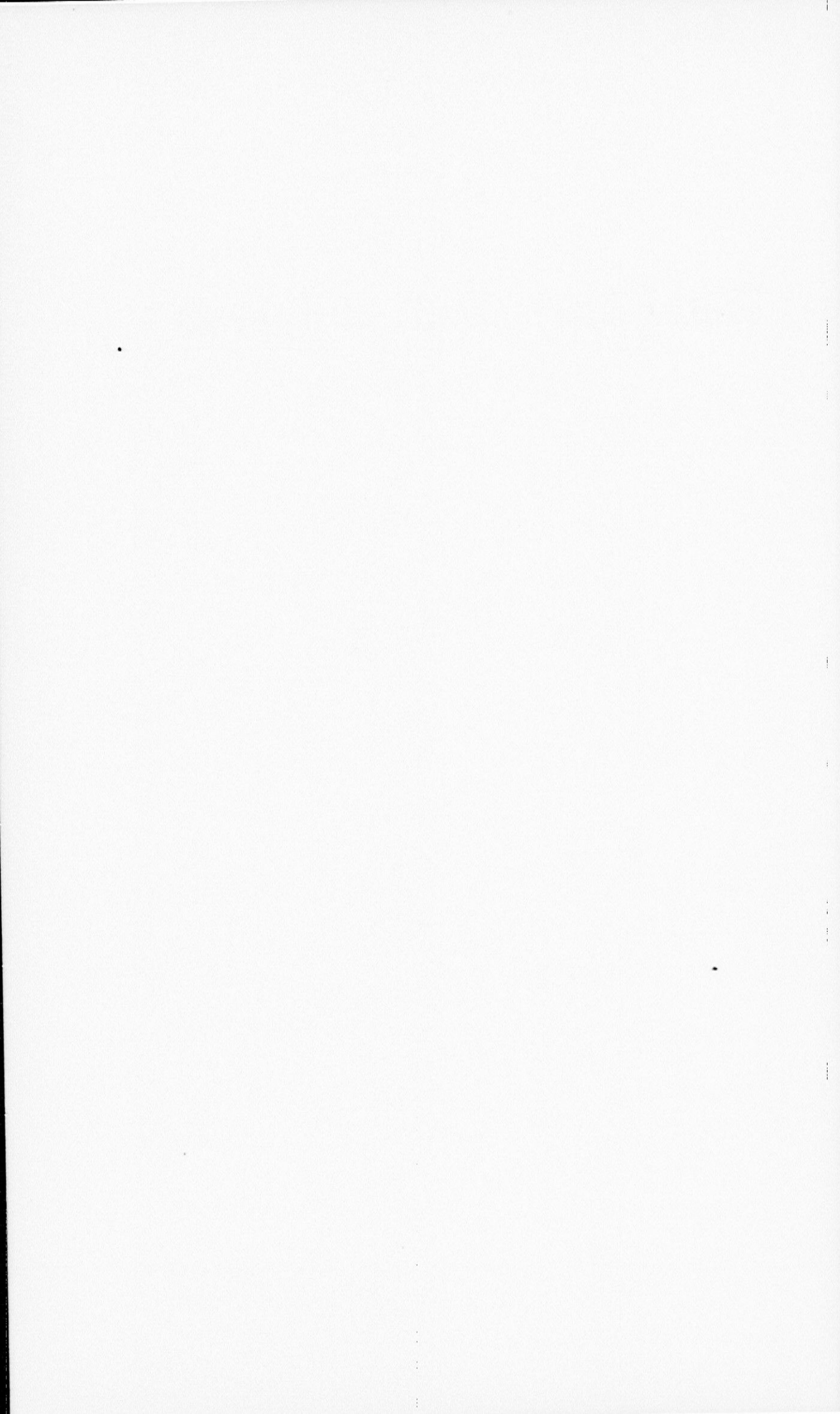
MARK P. FRIEDLANDER,
LEROY A. BRILL.

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APPENDIX

INDEX TO JOINT APPENDIX.

	Page
I. Pleadings, Docket Entries and Other Papers.....	2
Petition for Caveat	2
Answer of Ervin Schwartz to Petition for Caveat	3
Order Framing Issues	5
Order Aligning Parties	6
Decree Admitting Will to Probate	6
II. Excerpts from Testimony and Proceedings.....	7
Deposition of Ernest V. Polutnik	7
Second Deposition of Mrs. Elizabeth Gál.....	17
Excerpts from Statement of Mrs. Elizabeth Gál....	19
Deposition of Ervin Schwartz	19
Deposition of Howard E. Travers	25



IN THE
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DISTRICT OF COLUMBIA

No. 9831.

ETHEL V. LANSTON, *Appellant*,

v.

ERVIN SCHWARTZ, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

JOINT APPENDIX.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS**

145

Filed Sep 24 1945

In the District Court of the United States for the District
of Columbia.

Administration No. 60728

IN RE: Estate of AUBREY LANSTON, *Deceased*.**Petition for Caveat**

The petition of Ethel V. Lanston respectfully represents
to this Honorable Court:

1. That she is a citizen of the United States and a resident of the City of Washington, District of Columbia, and that she is the widow of Aubrey Lanston, deceased, and is of full age.

2. That she has noticed that a certain paper writing bearing date of the 5th of December, 1940, has been filed in this Honorable Court as the last will and testament of said Aubrey Lanston, deceased.

3. That her interest will be injuriously affected by the allowance of said pretended will, or its admission to probate; that she does hereby contest the probate and validity of said paper writing purporting to be the last will and testament of Aubrey Lanston, deceased and for that purpose alleges:

First: That said paper writing bearing date of December 5, 1940, is not the last will and testament of said deceased.

Second: That the attesting witnesses to said alleged will did not nor did any one of them sign his or her name as a witness to the said alleged will at the request of the said Aubrey Lanston.

146 Third: That the said paper writing purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said Aubrey Lanston by fraud and deceit exercised upon him by one Ervin Schwartz or some other person or persons unknown to petitioner.

Fourth: That the said paper writing purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said Aubrey Lanston by the undue influence, duress and coercion exercised upon him by one Ervin Schwartz or some other person or persons unknown to petitioner.

Wherefore, the premises considered, the petitioner prays:

1. That process may issue from this court requiring the parties in interest to answer the exigencies of this petition.

2. That said paper writing may be refused probate.

3. That issues may be framed between the caveator and caveatee of the will, to be tried by jury to determine the facts of the alleged will.

4. And for such other and further relief as to the Court may seem meet and proper.

ETHEL V. LANSTON.

MARK P. FRIEDLANDER,
Atty. for Petitioner.

* * * * *

Answer of Ervin Schwartz to Petition for Caveat

154

Filed Feb 15 1946

Ervin Schwartz, by William Sabine, his attorney by Designation of the Alien Property Custodian, for answer to the Petition for Caveat heretofore filed in this cause by Ethel V. Lanston, respectfully represents unto the Court as follows:

First Defense

The Petition for Caveat fails to allege that by a paper writing purporting to be the last will and testament of Aubrey Lanston, dated May 14, 1926, and on file in the above estate, Le Marechal de la Cour Grand-Duchale, Luxembourg, was appointed to receive the principal of a trust fund created by the last will and testament of Beattie Lanston and to receive which this respondent was appointed by the paper writing dated December 5, 1940, referred to in paragraph 2 of the petition, and it is not shown that process has issued directed to Le Marechal de la Cour Grand-Duchale, a necessary party to this proceeding.

Second Defense

1, 2. This respondent admits the allegations of paragraphs 1 and 2 of the Petition for Caveat.

3. This respondent denies the allegations of paragraph 3 of said Petition and more specifically says:

First: That the paper writing therein bearing date of December 5, 1940, is the last will and testament of Aubrey Lanston.

Second: That the attesting witnesses to said paper writing each signed his and her name as a witness to the said will at the request of the said Aubrey Lanston.

155 Third: That the said writing purporting to be the last will and testament of Aubrey Lanston was not obtained and the execution thereof was not procured from the said Aubrey Lanston by fraud and deceit exercised upon him by this respondent or any other person or persons.

Fourth: That the said paper writing purporting to be the last will and testament of said Aubrey Lanston was not obtained and the execution thereof was not procured from the said Aubrey Lanston by the undue influence, duress and coercion exercised upon him by this respondent or any other person or persons.

Wherefore, having fully answered, this respondent, without waiving his First Defense, says that he is willing that the issues may be framed and tried before a jury as by law provided in order that the truth of the allegations of the foresaid Caveat may be determined.

ERVIN SCHWARTZ

By WILLIAM SABINE,
c/o Alien Property Custodian
National Press Building,
Washington, D. C.

* * * * *

Order Framing Issues

158

Filed Mar 13 1946

Upon consideration of the caveat of Ethel V. Lanston, filed herein against a certain paper writing bearing date the 5th day of December, 1940, filed herein, purporting to be the last will and testament of Aubrey Lanston, deceased, and of the answer of Ervin Schwartz filed thereto, it is by the Court this 13 day of March 1946.

ORDERED, That the following issues be and they are hereby framed to be tried before a jury on the 1st day of October 1-946:

One: Was the paper writing filed in this Court and bearing date the 5th day of December 1940, the last will and testament of Aubrey Lanston, deceased?

Two: Was the said paper writing dated the 5th day of December, 1940, purporting to be the last will and testament of Aubrey Lanston, deceased, executed and attested in due form, as required by law?

Three: Was the said paper writing dated the 5th day of December 1940, obtained, or the execution thereof, or the subscription thereto procured from the said Aubrey Lanston, deceased, by fraud or deceit practised upon the said Aubrey Lanston by Ervin Schwartz or any other person or persons?

Four: Was the said paper writing dated the 5th day of December, 1940, obtained, or the execution thereof procured from the said Aubrey Lanston, deceased, by the undue influence or duress, or coercion of Ervin Schwartz or any other person or persons?

ALEXANDER HOLTZOFF,
Justice.

* * * * *

Order Aligning Parties

153 Filed Feb 3-1947

This cause coming on for pretrial,
It is by the Court this 3rd day of February, 1947

ORDERED, That the Caveator, Ethel V. Lanston, shall be the Plaintiff in the trial of said issues, and that the Caveatee, Erwin Schwartz, shall be the Defendant.

JAS. W. MORRIS,
Justice.

* * * * *

Decree Admitting Will to Probate

157 Filed Mar 3-1948

Upon motion of counsel for the caveatees in this case, and upon consideration of the prior proceedings herein, it appearing to the court that by the verdict of the jury impaneled to try the issues framed herein, the paper writing dated the 5th day of December, 1940, filed in this court, purporting to be the last will and testament of Aubrey Lanston, deceased, was sustained, it is, this 3d day of March, 1948,

ADJUDGED, ORDERED AND DECREED, that the said will of Aubrey Lanston, deceased, dated December 5th, 1940, be and the same hereby is admitted to probate and record.

MATHEW F. MCGUIRE,
Justice.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

Deposition of Ernest V. Polutnik

25 Q. What is your name and address? A. Ernest V. Polutnik.

Q. What is your present occupation? A. Vice Consul of the United States of America.

Q. Accompanying these interrogatories is a paper writing appearing to be the will of Aubrey Lanston to which the name of Ernest V. Polutnik is subscribed as a witness. Was the name Ernest V. Polutnik subscribed on said paper writing by you? A. Yes.

Q. If your answer to Question 3 is in the affirmative, state the names of all persons who were present when you signed the paper writing. A. Mrs. Elizabeth Gal and Aubrey Lanston were present when I signed the paper under reference.

Q. Have you known Aubrey Lanston in Budapest, Hungary, and if so, did you have occasion to see him in December, 1940? A. Yes.

26 Q. If your answer to Question 3 is in the affirmative, was the paper writing signed by you in the presence of Aubrey Lanston? A. Yes.

Q. If your answer to Question 6 is in the affirmative, did Aubrey Lanston indicate that the paper writing was his will? A. Yes.

Q. Did Aubrey Lanston sign the paper writing in your presence? A. Yes.

Q. Did Aubrey Lanston sign the paper writing before you signed your name? A. Yes.

Q. If your answer to Question 8 is in the affirmative, at the time the paper writing was signed by Aubrey Lanston, was he over 21 years of age? A. At the time the paper was signed by Mr. Lanston, I knew him to be approximately 60 years of age.

Q. If your answers to Questions 3 and 8 are in the affirmative, state the place, with address, where the paper writing

was signed. A. American Legation,—this is a European address, if Your Honor please.

Mr. Friedlander: We will waive the address.

27 The Court: The American Legation in Budapest?

Mr. Sabine: (Taking the place of witness) It is an address in Budapest.

(Resuming the reading of the interrogatory.)

Q. What was your occupation, business or profession in Budapest on December 5, 1940? A. Vice Consul of the United States of America.

Q. What has been your occupation, business or profession subsequent to December 5, 1940? A. Vice Consul and clerk in the Foreign Service of the United States.

Q. Did Aubrey Lanston sign the paper writing in the presence of both you and Elizabeth Gal? A. Yes.

Q. Did you sign the paper writing in the presence of Elizabeth Gal? A. Yes.

This is signed Ernest V. Polutnik.

Mr. Kelsey: Your Honor, we now want to offer the will as an exhibit.

Mr. Friedlander: I think we probably should finish cross-examination.

The Court: I think so; also that we should have the deposition of the witness Gal.

I might say to the jury, you now have the testimony of the witness Polutnik through Mr. Sabine but
28 in answer to questions by those who offer the will for probate.

Now you will hear the cross-examination of the witness Polutnik through Mr. Kelsey, the questions on cross-examination to Mr. Polutnik being read by Mr. Friedlander.

By Mr. Friedlander:

These are the cross-interrogatories propounded to Ernest V. Polutnik.

Q. Did you know Aubrey Lanston prior to December, 1940? A. Yes.

Q. Explain how long you had known him and how well.

A. I recall that I first met Aubrey Lanston in June or July, 1939. By reason of his frequent visits to the Legation between that time and December 11, 1941, when Hungary declared war against the United States, I felt that I had come to know the man rather well; that is, I became well aware of his general temperament and many of his idiosyncrasies. But I knew nothing of his private affairs or his activities outside the Legation.

Q. Did you know Ervin Schwartz or any member of his family prior to December, 1940? A. I knew neither Ervin Schwartz nor any member of his family.

Q. Are you related by blood or marriage to Ervin Schwartz? A. No.

29 Q. Describe Ervin Schwartz, his age and appearance. A. I am unable to describe Ervin Schwartz because I do not recall ever having seen him.

Q. Since January, 1942, or at any time, have you discussed with Mr. Schwartz or any member of his family his claims to this estate? A. I do not recall ever having discussed with Mr. Schwartz or any member of his family anything in connection with the will or estate of Mr. Lanston.

Q. Since January, 1942 or at any time have you advised Ervin Schwartz or any member of his family in reference to this will? A. No.

Q. What did you observe about Aubrey Lanston's physical appearance at the time of the execution of the will? A. Only that he was nervous and quick-tempered. He always impressed me as being under-nourished and as not being in good health.

Q. What did you observe about Aubrey Lanston's physical condition at the time he appeared before the notary in September, 1941? A. I do not recall having seen him on that occasion.

Q. How was he dressed? Explain in detail. A. I recall that Mr. Lanston was usually dressed in a conservative business suit, white shirt with detachable starched

30 collar. He always wore a necktie. There was, in fact, nothing about his dress that would serve to attract any particular attention to him.

Q. Explain in detail all your transactions with Mr. Lanston. A. On various occasions he came to my office to inquire about visa matters. I recall that on one particular occasion he called and complained about the mail service between the United States and Hungary. He explained that a remittance he had been expecting had not reached him and that he was therefore in destitute circumstances. I advanced him a small sum of money, whereupon he offered to deposit as security with me a play he had written. I believe the play was entitled "The Blue Boy." I declined to accept the manuscript. Then there was the matter of his will to which I signed my name as a witness.

Q. State who was present at the time the will was executed in December, 1940. A. I am of the impression at this time that only Mr. Lanston, Mrs. Gal and myself were present when the will was executed.

Q. State the names of all persons who accompanied Mr. Lanston to the Legation. A. I do not know the names of the persons who accompanied Mr. Lanston to the Legation. 31 I only recall that on a few occasions when he visited the Legation, he was accompanied by a youth whom I and other members of the Legation's staff believed to be a gypsy.

Q. If you do not know the names, describe the persons. A. The youth in whose company I saw Mr. Lanston appeared to be about 17 years of age. He had the swarthinness and general untidiness of the younger gypsy males that could be seen about Budapest. Mrs. Elma Laurvik, the clerk who had custoday of American mail, called my attention to the lad and I believe that she described him as the gypsy companion of Mr. Lanston. This is probably what gave me the impression that the lad was a gypsy.

This is signed Ernest V. Polutnik.

Mr. Kelsey: To go conveniently along, I think the second deposition of Mr. Polutnik should be read.

The Court: With reference to the same subject matter?

Mr. Friedlander: Yes.

The Court: Very well.

Mr. Friedlander: May we come to the bench, Your Honor?

The Court: Yes.

(Thereupon, the following proceedings took place at the bench between the Court and counsel, outside the hearing of the jury:)

Mr. Friedlander: He refers to statement No. 1, I think.

The Court: I think the whole statement should go
32 in. It has to do with the whole transaction. We are
concerned with the execution, the circumstances surrounding the execution; also the question of undue influence and fraud.

Read it all.

Mr. Friedlander: Should I read it?

The Court: Mr. Sabine may read it.

It has been stipulated she lived in Budapest so we won't get into these addresses, which are unpronounceable.

(Thereupon the following proceedings took place in open Court within the hearing of the jury.)

At this point in the proceedings, statement of Ernest V. Polutnik, entitled "Enclosure No. 1" was read by Mr. Sabine:

Statement of Ernest V. Polutnik

In connection with the Will of Aubrey Lanston, deceased.

Although more than five years have elapsed since I acted as a witness to the will of Aubrey Lanston, deceased, I recollect a number of the circumstances surrounding the signing and the witnessing of the document.

I recall that in 1940, at which time I was serving as an American Vice Consul in the American Legation in Budapest, Mr. Lanston frequently called at my office for various

reasons. I also recall that on some of his visits he was accompanied to the Legation by a Gypsy youth, but I do not recall that any person of the name of Ervin Schwartz ever accompanied him to my office.

33 I further recall that on one of his visits to my office Mr. Lanston told me that he wished to execute a will and requested that I prepare the document for him. Explaining that American Consular officers are prohibited by their regulations from rendering legal services of that character, I declined to assist him to that extent, but I recall that I did suggest that it might be advisable for him to place the matter in the hands of some competent local attorney. I did not suggest any particular attorney, and I do not know whether he ever took the matter up with an attorney. However, a few days after I had made the suggestion, Mr. Lanston returned to my office and drew from his pocket a document which he explained was his will. When he inquired whether I would act as a witness to his signing of the document, I replied in the negative, but after some further discussion I decided to accede to his request. Mr. Lanston then inquired whether Mrs. Elizabeth Gal, who at that time was employed as clerk in the Legation, would also act as a witness. Upon being informed by her that she would, Mr. Lanston proceeded to sign the document and both Mrs. Gal and I signed as witness. I recall these actions rather vividly because Mr. Lanston seemed to exercise great care in seeing that Mrs. Gal and I actually witnessed his signing of the document and that we sign as witnesses in the presence of each other.

I do not recall that any persons other than Mr.
34 Lanston, Mrs. Gal and myself were present in the room at the time the will was signed and witnessed, and I feel sure that no person of the name of Ervin Schwartz was present.

I do not know any person of the name of Ervin Schwartz or anything concerning the business connections and activities of any person of that name.

I know of no persons in Budapest except Mrs. Gal and Mrs. Elizabeth Keller, now a clerk in the Legation, who knew Mr. Lanston while he was in Budapest. The address of Mrs. Gal is II. Margit körut 73, Budapest and that of Mrs. Keller is VIII Ullői ut 60, Budapest. I believe that Mr. Lanston was also known to Mr. Howard K. Travers and Mrs. Elma Laurvik, both of whom served in Budapest while Mr. Lanston resided in this City. Mr. Travers is now Chief of the Visa Division, Department of State, and Mrs. Laurvik is a clerk in the American Legation at Bern.

As to the circumstances attending the execution of the will other than the formal signing and witnessing thereof, I may state that, as indicated above, Mr. Lanston impressed me as being very meticulous about the entire matter. I recall that he carefully refrained from signing the will until after he had ascertained that Mrs. Gal and myself were willing to sign as witnesses, and that he was quite punctilious in requiring that both witnesses sign in the presence of each other. He left upon me the impression that he had

35 been carefully advised by some legal authority or had himself made a thorough study of the legal requirements to be carried out in executing a will. At that time I was not aware of the fact that he professed to be a lawyer.

In my opinion, which is based on my recollections of what took place at the time the will was signed and witnessed, there is no reason to believe that the signing of the document was not the free act of Mr. Lanston.

As to whether Mr. Lanston was mentally incapable of making a will, I can only state that he impressed me as being a man who knew perfectly well what he was doing and that he was doing it with determination. In making this statement I do not, however, wish to convey the impression that I believed him to be normal in all respects. In my dealings with him I found that he consistently refused to believe anything that was not conclusive to his own advantage or convenience. He was abnormally pugnacious, un-

necessarily rude and abusive, argumentative and extremely irritating, and in general he so comported himself that his visits to the Legation were, for the greater part, unpleasant affairs to all the staff with whom he came in contact. Moreover, his companionship with the Gypsy youth hereinbefore mentioned, and the fact that he was reputed to have taken up abode in the home of this youth's indigent family earned for him locally an unsavory reputation. All

these combined made me regard him as a very enigmatic character.

36 Signed by Ernest V. Polutnik.

Mr. Kelsey: Your Honor, I now wish to offer the second set of interrogatories to Ernest V. Polutnik and I will continue reading the questions and Mr. Sabine the answers.

(Read by Mr. Kelsey:)

Q. I hand you photostatic copy of statement dated January 4, 1946 and marked "Enclosure No. 1 . . . Statement of Ernest V. Polutnik", and ask you if you made the statement and signed the same? A. Yes.

Q. Under what circumstances did you prepare and execute this statement? A. On December 26, 1945 the American Legation in Budapest received from the Department of State an instruction dated December 6, 1945 with which was enclosed a copy of a communication from the Office of Alien Property Custodian requesting me to furnish information covering the following points: (1) Did I recollect the circumstances of the signing and witnessing of Aubrey Lanston's will; (2) Was the will signed by Aubrey Lanston in the presence of two witnesses; (3) Did the witnesses subscribe their names at Aubrey Lanston's request; (4) Was Ervin Schwartz present; and (5) Whether I knew Ervin Schwartz, for how long a time I had been acquainted with him, and whether I was familiar with his business connections and activities.

37 The statement referred to was my reply to the questions raised by the Office of Alien Property Custodian.

Q. Is the statement correct and are there any items in said statement which are not correct? Please point out such items as are not correct. A. To the best of my knowledge and belief, the statement is correct. I know of no item in the statement that is not correct.

Q. Will you state in detail the circumstances which led up to your acting as a witness to the will of Aubrey Lanston? (If your memory needs refreshing will you examine the "Enclosure No. 1" to refresh your recollection). A. When Aubrey Lanston first requested me to act as a witness to the will, I declined. However, after further conversation and thought about the matter, I decided that I might properly act as a witness to the will. I then signed in that capacity.

Q. Will you explain to us Mr. Lanston's condition at the time he executed the will, explaining, if you will, in detail, his general attitude and conduct at that time? A. He was thin, this gave me the impression that he must be either ill or under-nourished. His behavior on this occasion was not discourteous. To me this was noticeable for the reason that he was invariably rude and quarrelsome when he came to the Legation.

38 Q. Will you describe in detail your impression of Mr. Lanston at the time he executed the will? A. In response to this I can only repeat what I set forth in the last paragraph of the statement I prepared on January 4, 1946. I refer to the statement of which a photostatic copy has been made and marked "Enclosure No. 1 . . . Statement of Ernest V. Polutnik."

Q. Did you know other persons who knew Mr. Lanston? A. The only persons whom I know to be acquainted with Aubrey Lanston are those I mentioned in the statement referred to above.

Q. Are you able to state Mr. Lanston's reputation in Budapest? A. My understanding is that his reputation in Budapest was not good. In casual conversation Hungarians frequently mentioned his name and commented on

the way he chose to live and the districts in which he resided. His association with local gypsies seemed to be a subject of considerable discussion among the Hungarians and certain Hungarian members of the Legation's staff. I further recall that an expulsion order was issued against him by the Hungarian police. I do not know on what basis or for what reasons the expulsion order was issued.

Q. Will you please state the same? A. I can only repeat what I have stated in response to the eighth
39 interrogatory.

The Court: May I remind the jury this is continued cross examination of the witness who has testified to the circumstances surrounding the execution of the will and the character and appearance of the decedent.

(Read by Mr. Friedlander)

Q. State whether or not Aubrey Lanston was a person who was easily susceptible to suggestion and influence by others. A. In my dealings with him, I found Aubrey Lanston to be stubborn. Whether persons outside the Legation exercised any influence over him I am unable to say.

Q. What is the basis for your answer to the prior cross-interrogatory? A. In visa or passport matters, he did not readily respond to suggestions or advice. If the carrying out of the advice or suggestions caused him inconvenience or expense, he became extremely argumentative and even abusive. It was only in matters of this nature that I came in contact with him.

Q. State whether or not at the time of executing his will Aubrey Lanston appeared to be aware of what he was doing. A. I was of the impression that Aubrey Lanston was very well aware of what he was doing at the time he executed the will.

Q. What is the basis for your answer to the prior cross-interrogatory? A. I gained this impression from the
40 fact that he evidently exercised every effort and care to make certain that the will conformed to legal

requirements. I also recall that he explained that the document was what is known in legal circles as a holographic will, that for that reason witnesses to the document were not essential, but that he nevertheless wished the execution of the will to be witnessed by two persons. He mentioned that he was a lawyer.

Q. State whether or not at the time of executing his will Aubrey Lanston appeared to be doing it of his own free will.

A. I believe that at the time he executed the will, Aubrey Lanston was doing so of his own free will.

Q. What is the basis for your answer to the prior cross-interrogatory? A. Aubrey Lanston's general conduct and determined attitude at the time I acted as a witness to the will left upon me the impression that the execution of the document was of his own free will. I clearly recall that he was very persistent in inducing me to act as a witness to the will. I am unable to state, however, whether the execution of the will was due to fear, threats, or other forms of duress. He made no mention of anything of that character.

Signed by Ernest V. Polutnik.

* * * * *

Second Deposition of Mrs. Elizabeth Gál

52 Q. Will you tell us, in substance, what conversations you had with Mr. Polutnik respecting your acting as witnesses to the will? A. It was once only that Mr. Polutnik and I were talking about the will. That was after he had asked us to act for him as witnesses. The gist of our conversation was that while we did not incur any liability whatever by acting as witnesses, yet we were not too pleased to have to do the favor in the light of the odd nature of Mr. Lanston and the peculiarity of the circumstances.

Q. Were you hesitant about acting as a witness to Mr. Lanston's will? A. There being no reasonable excuse, I had to comply with his request.

* * * * *

53 Q. Was Mr. Lanston, in your opinion, a normal person, or was he erratic? A. If I go by his behavior, I cannot describe Mr. Lanston's state of mind as balanced.

Q. Was there any doubt in your mind as to the mental capacity of Mr. Lanston to execute this will? A. The behavior of Mr. Lanston was not such as to allow the assumption that he could form a fair judgment of his acts or the propriety of the contents of his will.

* * * * *

62 Q. Was he, in your opinion, a person of balanced or unbalanced mind? A. My impression was that Mr. Lanston was a man of unbalanced mind, to a high degree.

Q. What impression did he give you as to his condition, both mental and physical, at the time he executed the will? A. He looked poor in health. He was emaciated, a man who must have gone through bad times.

* * * * *

107 By Mr. Kelsey:

Q. Have you had any medical or technical training or experience which enables you to answer interrogatories Nos. 9, 10, 11, and 12; if so state what it was? A. For several years past, I have been translating medical papers from English into Hungarian, and vice-versa. This work made it necessary for me to study medical books. Thus I could not help gathering certain knowledge.

Mr. Kelsey: I would like to have the answer excluded, Your Honor.

The Court: Let it stand excluded. The witness is not an expert.

Mr. Kelsey: Will you so charge the jury?

The Court: Members of the jury, this witness who purports to express an opinion medically is not a person that has been trained in that profession and as a consequence,

her opinion for that reason has been excluded; just the same as my opinion on architecture would not be material.

* * * * *

A. Although it was no intention of mine, to watch him when in the Consulate, yet I can say that one's attention was caught by his being confused, discomposed and irritated.

* * * * *

Excerpt from Statement of Mrs. Elizabeth Gál

142 In view of my recollections of him I must say that the question whether Mr. Lanston signed the will as his own free act and whether he was mentally incapable of making his will, seems to be a highly debatable one, especially if it is remembered that he used to be a lawyer. It is true that he had exhibited great exactness at the time of signing his will; on the other hand, almost at all occasions when he had called at the Legation he gave the impression of a person of an unbalanced mind, unable to consider the weight and consequences of his actions. It could be seen that once he had been a man of culture, but also that he had completely lost his sense of judgment and self-respect. He associated almost exclusively with people much below his own class and it was obvious that this strongly influenced him.

ELIZABETH GAL.

* * * * *

Deposition of Ervin Schwartz

64 Q. (Reading) What is your name and address?

A. Ervin Sarospataki (Schwartz), at 78, Dohany utca, Budapest VII.

Q. If your name is not Ervin Schwartz, was it Ervin Schwartz in December, 1940, and if so, explain the change.

A. My name is Ervin Sarospataki now but in December, 1940, it was Ervin Schwartz. The explanation is that as my name had a German sounding, I had it changed for "Sarospatski" with the permission of the Hungarian Min-

ister of the Interior, given on April 29, 1946, under No. 81.029/1946-II.

Q. What is your occupation? A. A business clerk.

Q. Accompanying these interrogatories is a paper writing appearing to be the will of Aubrey Lanston and in said paper writing Ervin Schwartz, c/o Nenzeti Bank, Szabadsag ter 9, Budapest, Hungary, is appointed to receive certain property. Did Aubrey Lanston inform you that he had executed a will? If, so, did Aubrey Lanston leave an authenticated copy of a will with your mother? If, so, is it a copy of the accompanying paper writing? A.

65 Having taken insight into the instrument, I can say that I was told by Aubrey Lanston that he had signed "a" Last Will and Testament. (The quotation marks are mine. Translator.) Aubrey Lanston gave my mother the original of the will and not its certified copy. It is in my possession now too. It is a true and correct copy of the instrument now looked into by me. I believe the address of the National Bank' at 9, Szabadsag ter, Budapest, was given by Aubrey Lanston not to indicate my home address but rather as that of the banking corporation to attend to the transaction.

Cross Interrogatories

By Mr. Friedlander:

Q. Please state the date of your birth. A. August 8, 1925.

Q. Where did you live in December, 1940? A. At 78, Dohany utca, Budapest VII.

Q. With whom did you live at that time? A. With my mother, my younger brother and Aubrey Lanston.

Q. State the names of all members of the household in December, 1940. A. Those given in answer 3.

Q. Give the present addresses of all such persons. A. My mother lives in Nagyvarad /Roumania/, at 13, Szent Jance utca. Her present name is Mrs. Bela Rosenblatt. My

66 younger brother lives there too. His name is now Oscar Szilagyi.

Q. What license did you or your family have in December, 1940 to operate a rooming and/or boarding home? A. Neither I nor any other member of my family were in December, 1940, holders of a license to enable us to offer board and lodging on a business basis. We were having a three rooms flat and one room we had sublet to Aubrey Lanston. That we could do without any license.

Q. What did you charge Mr. Lanston for his room? A. We monthly received pengoe 35 or 40, for the room. We regarded him as a family-member and my mother charged him cost-price only.

Q. Were you or your family fully paid, month by month? A. Except for two months, immediately preceding the death of Aubrey Lanston, we received the full equivalent as due.

Q. What amount, if any, was due to you or your family immediately prior to December, 1940? A. It is the amount mentioned in my answer to question 7, representing the cost of the room and board.

Q. During 1941 and prior to Mr. Lanston's death in 1942 how much did Mr. Lanston pay you or your family for his room charges? A. What I had referred to in my answer to question 7.

Q. What was the amount due you or your family in September, 1941? A. The same amount stated in my answer to question No. 7. According to my recollection, the money from America arrived, occasionally, with delay. At 67 such times, he would borrow small sums from my mother.

Q. Where did Mr. Lanston live prior to his entering your home? A. In a small room at 4, Kisfuvaros utca, first floor, No. 7, sublet by Armin Heller, a maker of fancy leather goods.

Q. State the reasons given by Mr. Lanston for leaving such prior place. A. During the time when Lanston lived there, Armin Heller's son was putting up at another place.

Presently, he wanted to go back to his parents and he wanted the room occupied by Lanston. At that time I was a valet to Armin Heller. Mrs. Heller, inquired if I knew of a room for Lanston. Just then we had one vacated and I suggested the room to her. And Lanston moved in.

Q. What was his apparent financial condition when he engaged a room at your home? A. The financial circumstances of Aubrey Lanston were known to me already at a time when he was living in the home of the Hellers. To my knowledge, he was receiving the equivalent of Pengoe 300, on an average, from America, monthly.

Q. Did Aubrey Lanston take his meals at your home? A. Yes.

Q. If your answer to the foregoing is "No", where did he eat? A. It calls for no answer, having replied
68 in the affirmative to the preceding question.

The Court: Skip No. 17 because No. 16 is not answered.

By Mr. Friedlander: (Reading)

Q. When did Aubrey Lanston become ill? A. In November, 1941, Aubrey Lanston, was, as a foreigner, sent to the detention house in Budapest, by the then authorities charged with the control of foreigners and, as much as I know, there he was taken ill.

Q. What did he suffer from? A. In that period he was complaining to me about his kidneys. He also said he could not have a proper rest in the detention house and that that was worsening his condition.

Q. State the name and address of the physician who attended him. A. A physician by the name of Dr. Klein. I cannot remember what his second name was. He used to live at 14, Matyas ter, Budapest VIII. I think he still lives there.

Q. Who paid the physician for his services? A. Aubrey Lanston paid the physician when he had received his money.

Q. Describe Aubrey Lanston's physical appearance in

December, 1940. A. In December, 1940, Aubrey Lanston was a thin, bony man with a contemplative look.

69 Q. Describe his manner of dress in December, 1940.

A. As I remember it he did not care much for dresses. Nevertheless, he used to have proper clothing.

Q. Was Mr. Lanston related to you or any member of your family? A. He was not a relative either of me or any other member of my family.

Q. Did you and your family discuss Aubrey Lanston's financial condition and his debt to you and your family, if any:

(a) Prior to December, 1940?

(b) After December, 1940 and prior to January, 1942?

A. Prior to December, 1940 and between that date and January, 1942, neither I nor any member, any other member, of my family had discussed with Aubrey Lanston his financial position or what he was owing us. As a matter of course, he had paid what was coming to us for board and lodging and so we had no reason to talk about it.

Q. Did you ever request Mr. Travers of the American Legation to request the Trustees in Washington, D. C. for additional money for rent, food and doctors for Mrs. Lanston? A. According to my recollection, Aubrey Lanston had asked an officer of the American Legation to communicate with his trustees with a view of obtaining funds to cover the cost of his rent, food and medical treatment.

70 Whether the name of that gentleman was Mr. Travers, I can no longer remember. I did not speak to anyone about it.

Q. Did any member of your family make such a request?

A. No, no one in my family had approached him in this matter.

Q. Do you have any relatives or friends who acted for you or your family in making demands or requests for money of the American Legation in Budapest? A. I have no such a relative or friend.

Q. Did you or your family or anyone accompany Mr.

Lanston to the American Legation at the time of the execution of the will? A. I have no exact recollection of that.

Q. Did he give any reason for leaving this money to you? A. Mr. Lanston said he had left his money to me as I was his best friend, always ready to attend to every business of his.

Q. When did Mr. Lanston become a roomer at your house? A. It was toward the end of 1940 that Mr. Lanston had first rented a room in our home.

Q. Did you know Mr. Lanston prior to his coming to your home? A. Yes, I knew him from Armin Heller to whom I was an apprentice. He lived there.

Q. Did Mr. Lanston have any money except from his father and mother's estate? A. He had no other money, as far as I know.

71 Q. Where was Mr. Lanston buried? A. In the Jewish cemetery at Bakoskeresztur.

Q. Did you know whether or not Mr. Lanston was under surveillance by the Budapest police? A. As much as I know, he was not under police surveillance but merely under the control of the National Central Office for the Control of Foreigners, being a foreigner himself.

Q. Did you know whether or not Legation officials were urging Mr. Lanston to leave Budapest and return to America? A. I knew it from Lanston that officers of the legation were trying to persuade him to leave Budapest and go to Turkey.

Q. What became of his belongings? A. He had left a trunk in the detention house with various articles for daily use. This has, however, not been handed over to us, following his death. All we have from him is a hat. We still have it.

(Reading) My deposition has been read out to me and I find it has been taken down correctly.

It is signed "Ervin Sarospatski /Schwartz/."

* * * * *

Deposition of Howard E. Travers

88 A. Howard E. Travers, Foreign Service Officer,
assigned as Consul General of the United States at
Vancouver, B. C., Canada.

* * * * *

90 A. Mr. Lanston, in my opinion, was sick physi-
cally and mentally. He appeared to me to have a per-
secution complex and he was afflicted with some sort of
physical disorder which caused him to emit a very disagree-
able odor.

Q. How often did you see Mr. Lanston? A. During my
stay in Budapest I probably saw him forty times. I might
see him four times a week and then go for three months
without seeing him.

* * * * *

A. As I recall it, it was in 1940 when the State Depart-
ment suggested we ask all American citizens to return to
the United States on account of the war and I urged Mr.
Lanston to do so.

Mr. Kelsey: I object.

The Court: These questions, so far, are not material to
the issues involved here.

Mr. Kelsey: May we have them excluded, Your Honor?

The Court: The question and answer, also?

Mr. Kelsey: May we have the answer excluded?

The Court: Now, just a minute, the question and answer
is excluded.

* * * * *

A. He insisted on remaining in Budapest.

* * * * *

94 Q. (a) Was someone called "Mr. Schwartz" pre-
95 sented to you at your Consulate office? A. Yes.

Q. (b) Was this Mr. Schwartz connected in some
way with Mr. Lanston? A. Yes, he claimed to be a relative

of a young boy with whom Mr. Lanston was said to be very friendly.

Q. (c) If so, do you know what that connection was? A. Yes.

Q. (d) If your answer to the foregoing is "Yes", state what that connection was and then describe Mr. Schwartz. A. Any attempt to describe Mr. Schwartz would be misleading. I saw him perhaps three times in a very difficult period when I was seeing several hundred people a day. It must be realized that we were making arrangements to send all American citizens to the United States and there were probably a thousand persons a day attempting to leave for the United States. My recollection, however, was that Mr. Schwartz was clean shaven and a man perhaps 45 years of age. He was of the so-called "gypsy" type. He was described to me as a relative of a boy in whom Mr. Lanston was much interested.

Q. Will you explain what, if anything, was said by Mr. Schwartz in reference to obtaining more money from the Lanston estate for Mr. Lanston because he was ill? A. I remember that Mr. Schwartz asked me if it was not possible to obtain money from the United States to advance to Mr. Lanston. He said that he had permitted him to live with him for some time. I told him that there was only one thing for Mr. Lanston to do, that was to return to the United States.

Q. How old a man do you think this Mr. Schwartz was? A. Once again, I am not at all certain, but I would say 45.

Q. At any time during your sojourn in Budapest did you ever have occasion to meet a boy or a young man named Ervin Schwartz, who, supposedly, was very friendly with Mr. Lanston and mentioned in his will? A. The boy came to the Legation with the first mentioned Mr. Schwartz who was a relative. I do not remember whether he was the father or the uncle of the boy.

* * * * *

97 A. There were times when Mr. Lanston appeared reasonable, but very rarely.

Q. (a) In your opinion, from talking to and observing Mr. Lanston during 1940, was he infirm? A. Yes, I believe he was.

* * * * * * * *

Q. (b) Did he indicate from his talk and actions that he was not physically and mentally well? A. Yes.

* * * * * * * *

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

*United States Court of Appeals
for the District of Columbia*

No. 9831

FILED JUN 18 1941

ETHEL V. LANSTON, APPELLANT,

Joseph W. Stewart

CLERK

v.

ERVIN SCHWARTZ, APPELLEE.

BRIEF FOR APPELLEE

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INDEX

	PAGE
COUNTERSTATEMENT OF THE CASE.....	1
STATUTES INVOLVED.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT:	
I—The burden of proving lack of testamentary capacity is on the caveator as the mental capacity of the testator is presumed.....	7
II—The caveator has failed to establish the lack of testamentary capacity of the testator.....	9
III—There was no evidence of undue influence which would justify the submission of the issue to the jury	13
CONCLUSION	14

CASES CITED

Barbour v. Moore, 4 App. D. C. 535.....	11
Barry v. American Security & Trust Co., 135 Fed. (2d) 470, 77 App. D. C. 351, 146 A. L. R. 124.....	13
Brosnan v. Brosnan, 263 U. S. 345 (1923), on remand 54 App. D. C. 73.....	7
Cleland v. Peters, 73 F. Supp. 769 (D. C. Pa. 1947).....	7
Duckett v. Duckett, 134 F. (2d) 527, 77 App. D. C. 303.....	13
Estate of Allan McLane, 21 D. C. 554.....	10
Estate of Talbert, 62 Wash. Law Review 999 (1934).....	8
Frene et al. v. Muratori, 79 App. D. C. 101, 142 Fed. (2d) 768	13
Leach v. Burr, 188 U. S. 510.....	8

	PAGE
Lewis v. American Security Trust Co., 53 App. D. C. 258, 289 Fed. 916.....	11
MacMillan v. Knost, 75 App. D. C. 261, 126 Fed. (2d) 235	13
Re Kester (Iowa), 167 N. W. 614.....	12
Rich v. Lemmon, 15 App. D. C. 507 (1899).....	8
Robinson v. Duvall (1906), 27 App. D. C. 535, aff'd (1907) 207 U. S. 583, 28 S. Ct. 260, 52 L. Ed. 351.....	12
Schmidtke v. Conesa (C. C. A. 1st 1944), 141 Fed. (2d) 634	9
Simpkins v. McDermott, 79 Fed. (2d) at 711, 712.....	14
Thompson v. Smith, 70 App. D. C. 65, 103 Fed. (2d) 936, 123 A. L. R. 76.....	10

STATUTES CITED

Title 19, D. C. Code (1940):

Section 101.....	4
Section 103.....	4
Section 305.....	4
Section 306.....	4
Section 307.....	5, 9
Section 308.....	5

OTHER AUTHORITIES

Mersch, Probate Court in Practice in the District of Columbia (1939).....	8
Moore's Federal Practice, Vol. 3, p. 3104.....	9
Wigmore on Evidence (3rd Ed.), Vol. IX, Sec. 2500.....	7

IN THE
United States Court of Appeals
DISTRICT OF COLUMBIA

No. 9831

ETHEL V. LANSTON, APPELLANT,

v.

ERVIN SCHWARTZ, APPELLEE.

BRIEF FOR APPELLEE

Counterstatement of the Case

This is an appeal from a final decree admitting a will of Aubrey Lanston to probate, a caveat proceeding having been instituted by his wife, who is the appellant herein. Mr. and Mrs. Lanston were married in 1901 (Tr. 115) and two children were born of the marriage. In 1922 Aubrey Lanston went to Europe (Tr. 116) and stayed there until his demise in 1942. His wife never saw him after 1922 (Tr. 116) although they remained on friendly terms (Tr. 117). Aubrey Lanston under his mother's will was given a power of appointment by will over the remainder of a trust fund which at the time of this proceeding amounted to about \$8,000 (Caveatee's Ex. No. 2, Tr. 81).

Mr. Lanston was living in Budapest in 1939 and was well known to the staff of the American Legation (App.

10). He was a playwright, lawyer (App. 17) and known as a man of stubborn disposition who did not readily respond to any suggestions or advice (App. 16). He usually dressed in a conservative business suit and there was nothing about his appearance that would cause any comment (App. 10). In 1940, he was living with a Hungarian family by the name of Heller and was forced to move (App. 22). He then took quarters at the home of the family of the appellee, Ervin Schwartz (App. 22), whom Lanston knew because the appellee was an apprentice to Heller (App. 24).

Mr. Lanston paid for his board and lodgings regularly and there never was any discussion of any financial obligations with the Schwartz family (App. 23). In December, 1940, Mr. Lanston came to the Legation and requested Ernest V. Polutnik, Vice Consul of the United States in the Budapest Legation, to prepare a will for him (App. 12). The Vice Consul explained that under the regulations, consular officers were prohibited from rendering legal services of that character (App. 12). A few days later Mr. Lanston returned with the will here in question (App. 12). Mr. Lanston requested that Mr. Polutnik and Mrs. Elizabeth Gál, employed as a clerk in the Legation, witness his will (App. 12). Mr. Lanston explained to them that the document was known in legal circles as a holographic will in which witnesses were not essential, but that nevertheless, he wished the execution to be witnessed by two persons (App. 17). He mentioned he was a lawyer (App. 17) and after the said persons agreed to act as witnesses, Mr. Lanston took great care in seeing that the witnesses actually witnessed his signing of the will and that they signed in the presence of each other (App. 12).

The whole matter was handled meticulously and in a lawyer-like manner (App. 13). The beneficiary Schwartz was not present at the time (App. 12) and Lanston impressed the Vice Consul "as being a man who knew perfectly well what he was doing and that he was doing it with determination" (App. 13). The other witness to the

will, Mrs. Gál, stated that although Lanston gave the impression of a person of unbalanced mind on his visits to the Legation (App. 19), at the time of the signing of the will he exhibited "great exactness" (App. 19). All the actions of Lanston on this occasion made it clear to the Vice Consul that Mr. Lanston was acting of his own free will without any duress (App. 17). About ten months later, in September, 1941, Mr. Lanston personally appeared and acknowledged this will before Robert H. Horsey, another Vice Consul in the Budapest Legation (Tr. 19, 83; Caveatee's Ex. No. 2). Mr. Lanston was placed in a "detention house" by the Hungarian authorities and thereafter died while in the "detention house" (App. 24; Plaintiff's Ex. 1).

The widow, Ethel V. Lanston, filed a petition for caveat of the will alleging as her opposition to probate:

- (a) That the document was not the last will and testament,
- (b) That the attesting witnesses did not sign at the request of the decedent,
- (c) That the said document was procured by fraud and deceit,
- (d) That the said document was procured (App. 2-3) by undue influence, duress and coercion.

The caveat did not raise the issue as to the testamentary capacity of the decedent. Issues were framed and the parties aligned; however, no issue of testamentary capacity was included in the framed issues (App. 5, 6). At the conclusion of the evidence of the caveatee, the caveator moved the Court to deny the probate on the ground that the caveatee had failed to prove the mental competency of the testator. This motion was overruled and at the conclusion of the testimony the Court directed a verdict on all the framed issues sustaining the will. The caveator appeals from the decree entered upon the directed verdict.

Statutes Involved

Title 19, D. C. Code (1940):

"SECTION 101. CAPACITY TO MAKE WILL.—No will, testament, or codicil shall be good or effectual for any purpose whatever unless the person making the same be, if a male, of the full age of 21 years, and if a female, the full age of 18 years, and be at the time of executing or acknowledging it, as hereinafter directed, of sound and disposing mind and capable of executing a valid deed or contract. (Mar. 3, 1901, 31 Stat. 1433, ch. 854, sec. 1625.)

* * * * *

"SECTION 103. FORM OF WILL—WITNESSES—ALTERATION—REVOCATION.—All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; * * *

* * * * *

"SECTION 305. PROOF OF WILL—PRODUCTION OF WITNESSES.—On the day appointed as aforesaid, or such day as the court may appoint, due proof of such publication and mailing being made, the court shall proceed to take proof of the will. All the witnesses to such will who are within the District and competent to testify must be produced and examined, or the absence of any of them satisfactorily accounted for.

"SECTION 306. * * * If all such witnesses shall be out of the United States then it will be sufficient to take the testimony of such of them as the court may require, and to prove the signature or signatures of the others.

"The testimony of such witnesses out of the District to be taken hereunder shall be under a commission issued by the court to one or more competent persons, and in such case the original will or codicil shall accompany the commissions and be exhibited to the witnesses.

"No notice need be given of the time and place of taking such testimony, unless in a case in which probate is opposed.

"SECTION 307. CAVEAT.—Will not to be probated while issues pending.

"If upon or prior to the hearing of the application to admit the will to probate, any party in interest shall file a caveat in opposition, duly verified, and setting forth facts inconsistent with the validity of the will, the said will shall not be admitted to probate until the issues raised by said caveat shall be determined as hereinafter directed. (Mar. 3, 1901, 31 Stat. 1212, ch. 854, § 136.)

"SECTION 308. ADMISSION TO PROBATE.—If, upon hearing the proofs submitted, the court shall be of opinion that the will was duly executed and the testator was competent to execute the same, and no caveat shall be filed against the admission of the same to probate, the court shall decree that the said will be admitted to probate and record."

Summary of Argument

The law of the District of Columbia is well settled that the proponent of a will establishes a prima facie case by proving the due execution of the will in accordance with the formal statutory requirements. The burden of proving that the testator lacked testamentary capacity is upon the caveator and this rule is based upon the presumption that every person is of sound mind in absence of proof to the contrary. The presumption is of greater effect than the mere creating of the prima facie case in behalf of the proponent of the will and it must be rebutted by the caveator by the weight of the evidence.

The caveator has waived his right to contest the issue of testamentary capacity by failing to raise that issue in the filing of her caveat in the Court below. It is apparent from the District Code Sections 19-307, 308, that the issue

as to the mental capacity of the testator must be separately raised in the caveat. Section 19-307 provides that the caveat shall set forth "evidence inconsistent with the validity of the will" and that the "will shall not be admitted to probate until the *issues by said caveat* shall be determined * * *". The failure of the caveator to raise this issue is equivalent to no caveat being filed against the will on that issue. Therefore, under Section 19-308, the Court properly directed the verdict since the will was duly executed.

Even assuming the caveator had not waived her right to raise the issue as to testamentary capacity, the record affirmatively establishes the competency of the testator. The testimony of the attesting witnesses definitely establishes that the testator was of sound mind at the time of the execution of the will. All of the circumstances prior to the execution and subsequent to the execution indicated that the testator had the capacity to properly dispose of his property. At most the evidence suggested by the caveator indicates that the testator was stubborn, irascible and erratic in his behavior at times other than the crucial date of the execution and acknowledgment of his will.

The caveator failed to introduce any evidence to support the claim of an undue influence. The caveator offered no direct evidence of any undue influence and the evidence supplied by the caveatee affirmatively negated any possibility of coercion or undue influence being brought to bear on the testator. There was no issue to present to the jury and the Court below properly directed the verdict.

ARGUMENT

I

The burden of proving lack of testamentary capacity is on the caveator as the mental capacity of the testator is presumed.

The rule generally prevailing is that there is a presumption that every person is of sound mind in absence of proof to the contrary (*Wigmore on Evidence* (3rd Ed.), Vol. IX, Sec. 2500).

“Sanity and mental capacity of a person signing an instrument are presumed, and the burden is on one who alleges the contrary * * *” (*Cleland v. Peters*, 73 F. Supp. 769, 771 (D. C. Pa. 1947)).

District of Columbia follows the general rule as indicated in the leading case in the Supreme Court in *Brosnan v. Brosnan*, 263 U. S. 345 (1923); on remand 54 App. D. C. 73. In this case a widow caveated the will of her husband on four grounds, viz: (1) defective execution; (2) mental capacity; (3) fraud; (4) undue influence. The Court directed a verdict in favor of the caveatee on the issues of fraud and undue influence. The Court charged the jury that the burden of proving testamentary capacity was upon the caveatee. The jury found for the caveator on the issue of testamentary capacity. The question as to the burden of proof was certified to the United States Supreme Court.

The United States Supreme Court held that, in the District of Columbia the burden of proving lack of testamentary capacity is always on the caveator. It stated that this rule was based upon the presumption that every person is of sound mind in absence of proof to the contrary. This presumption is of greater effect than creating a mere *prima facie* case in behalf of the proponent of the will and must be rebutted by the caveator by the weight of the evi-

dence. It is immaterial whether the caveat was filed before or after the probate of the will.

The court overruled a prior case, *Rich v. Lemmon*, 15 App. D. C. 507 (1899), and followed its own prior decision in *Leach v. Burr*, 188 U. S. 510.

"This is a specific decision (*Leach v. Burr*, 188 U. S. 510) that in the District of Columbia under a caveat filed in opposition to the probate of a will the burden of proof on an issue as to the mental capacity of the testator, is upon the caveator. It definitely determines the rule of law in the District. * * *

"Apart from any question of pleading as to the burden of allegation, this rule as to the burden of proof rests upon the ancient presumption in reference to sanity. *Higgins v. Carlton*, supra, p. 141. And viewed from a practical rather than an academic standpoint, it gives effective weight to the presumption of the testator's sanity and obviates the difficulty which would arise if such presumption were treated as one which merely established a *prima facie* case in favor of the proponent of the will but did not relieve him from the ultimate burden of persuasion on the question of the testator's mental capacity, involving a nice distinction tending to confusion in a jury trial. * * *

"For the foregoing reasons, in answer to the request of the Court of Appeals, it is instructed: That in the District of Columbia, under a caveat to a will challenging the mental capacity of the testator, whether before or after the will has been admitted to probate, the burden of proof on the issue whether the testator at the time of the executing the will was of sound and disposing mind and capable of executing a valid deed or contract, is upon the caveator" (pp. 348-350).

In accord:

Leach v. Burr, 188 U. S. 510 (1903);
Estate of Talbert, 62 Wash. Law Review 999 (1934);
Mersch—Probate Court in Practice in the District of Columbia (1939), at page 215.

II

The caveator has failed to establish the lack of testamentary capacity of the testator.

(a) The caveator did not raise the issue of testamentary capacity in her petition and thus has waived any right to raise it in opposition to the probate of the will. The District Code, Sections 19-307, 308 specifically require the caveat to set forth all issues in opposition to the probate of the will. Section 307 provided:

“Section 19-307 (29:57) Caveat—Will not to be probated while issues pending.

“If upon or prior to the hearing of the application to admit the will to probate, any party in interest shall file a caveat in opposition, duly verified, and setting forth facts inconsistent with the validity of the will, the said will shall not be admitted to probate until the issues raised by said caveat shall be determined as hereinafter directed. (Mar. 3, 1901, 31 Stat. 1212, ch. 854, § 136.)”

The caveator having attacked the probate on issues other than the mental capacity of the testator cannot by indirection claim the issue was presented below and warranted the submission of the mental capacity to the jury.

(b) A court may not decide a case on an issue not raised in the pleadings (*Schmidtke v. Conesa* (C. C. A. 1st 1944), 141 Fed. (2d) 634) and in such circumstance the Court should direct a verdict.

“The directed verdict is a device to save the time and trouble involved in length jury determination normally used when: (1) there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense; or (2) there are no controverted issues of fact upon which reasonable men could differ. The first category is obvious since the party has no pretense of a *prima facie* case or defense to carry him to the jury” (*Moore's Federal Practice*, Vol. 3, p. 3104).

(c) The proponents of the will were entitled to have the will probated because of the failure of the caveator to establish the mental incapacity of the testator. The record indicates the appropriate testamentary capacity of the testator at the time of the execution of the will (*Thompson v. Smith*, 70 App. D. C. 65, 103 Fed. (2d) 936, 123 A. L. R. 76), and the Court below was justified in directing a verdict for the caveatee.

"If from the evidence submitted by the caveators, the jury would not be justified in inferring fraud or undue influence in the making of this will, it was the plain duty of the justice presiding to direct the jury to return a verdict for the caveatees in accordance with the rule adopted by the Supreme Court of the United States in repeated instances, which if not in accord with the weight of authority elsewhere, as we think it is, would yet be the absolute rule for our guidance." *Estate of Allan McLane*, 21 D. C. 554, 562.

The testator was a person of stubborn disposition, difficult personality and a nuisance to the staff of the Legation in Budapest (App. 9, 16, 18). However, the circumstances of the execution of the will leave little room to doubt that Mr. Lanston knew what he was doing and accomplished the drafting of the will and its execution in a fashion which would do credit to any member of the bar (*supra*, pp. 2-3).

The test of sufficient mental capacity to dispose of one's property is not brought in question by unusual personality traits and habits suggested by the appellant as establishing mental incapacity.

"The question of mental capacity of an aged feeble person to dispose of her property is not whether or not the powers of her mind were impaired, or whether or not she had ordinary capacity to do business, but it is whether she had *any*—the *smallest*—capacity to understand what she was doing, and to determine intelligently whether or not she would do it." *Thompson v. Smith*, *supra*, at p. 74.

The holographic will of the testator is an example of clarity of thought and a model will. (Caveatee's Ex. 2—Tr. 82). The testator, aware of the fact that he needed no witnesses to a holographic will, took the additional precaution of having two disinterested witnesses, associated with the Legation appropriately attest the will. Not being satisfied with that, the testator ten months later appeared before the American Vice Consul at Budapest and executed a certificate of acknowledgment of the execution of the will (Tr. 83).

The appellant seeks to draw from the testimony of Elizabeth Gál, an attesting witness, and one Mr. Travers, a member of the staff of the Legation, sufficient proof of mental incapacity to warrant the submission of the issue to the jury (Appellant's Brief, p. 10). It is evident that the appellant has waived this contention by failure to present it in her caveat and having it framed as an issue for the jury (*supra*, p. 6). However, without consideration of the waiver, it is apparent that the record does not furnish evidence of mental incapacity. The test is whether the testator *at the time of executing the will* was capable of making a valid deed or contract (*Lewis v. American Security Trust Co.*, 53 App. D. C. 258, 289 Fed. 916).

“Nor is it necessary to the making of a valid will that the party should have a perfect memory, and that his mind should be wholly unimpaired by age, sickness or other infirmities. If the party possess memory and mind enough to know what property he owns and desires to dispose of, and the person or persons to whom he intends to give it, and the manner in which he wishes it applied by such person, and, generally, fully understands his purposes and the business he is engaged in, in so disposing of his property, he is, in contemplation of law, of sound and disposing mind.” *Barbour v. Moore*, 4 App. D. C. 535, 537.

We have already indicated the clear testimony of Vice Consul Polutnik as to the testators' capacity to execute a will (App. 13). The testimony of the subscribing witness Gál as to the mental incapacity of the testator must be

viewed with suspicion in view of the fact that she attested the will (*Re Kester* (Iowa), 167 N. W. 614). Moreover the witness Gál testified that at the time of the execution of the will the testator "exhibited great exactness" (App. 19). Her testimony relating to the other visits of the testator to the Legation was influenced by the fact that Mrs. Gál regarded Mr. Lanston as a man of culture who was associating with persons not in his social class (App. 19). The witness's statement that in her opinion the testator was of "unbalanced mind" was stricken by the Court below as without proper foundation (App. 18). The testimony of the witness, Travers, had no relation to the mental capacity of the testator at the time of the execution of the will (Tr. 89), and was based on what Mr. Travers believed was a persecution complex, a highly critical attitude of the testator to the witness (Tr. 97), and the fact that the testator was "excitable and angry" (Tr. 96). The opinion of this witness as to mental capacity is not admissible since he was not a medical expert. Speaking of testimony of persons other than attesting witnesses, as to the mental capacity of the testator, the Court stated:

"The mere naked opinion of other persons not occupying the positions of medical men are inadmissible in reference to the mental capacity of the testator whose will may be controverted."

Robinson v. Duvall (1906), 27 App. D. C. 535, 546, aff'd (1907) 207 U. S. 583, 28 S. Ct. 260, 52 L. Ed. 351.

The Court below properly directed a verdict on this issue for the caveator. Since the jury would not be justified in inferring the mental incapacity of the testator, it was the duty of the Court to direct the jury to return a verdict for the caveatee.

Since there was no affirmative evidence of mental incapacity at the time of the execution of the will, and in view of the caveator's failure to have the issue framed, the Court below properly directed a verdict for the caveatee.

III

There was no evidence of undue influence which would justify the submission of the issue to the jury.

The facts which the appellant cites to support the claim that undue influence was exercised on the testator (Appellant's Brief, p. 11) are wholly insufficient to raise any inference of undue influence. The fact that the possibility of undue influence is suggested is not enough to justify the submission of the issue to the jury.

This Court on appeal reversed a finding of a jury that undue influence was exercised in the execution of a will, stating:

"Moreover possibility or suspicion of undue influence is not enough. We find no evidence of oppression or coercion. We find no evidence of improper conduct as we interpret that term." (*MacMillan v. Knost*, 75 U. S. App. D. C. 261, 126 Fed. (2d) 235 at App. D. C. p. 262.)

It is well settled that influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced (*Barry v. American Security & Trust Co.*, 135 Fed. (2d) 470, 77 U. S. App. D. C. 351, 146 A. L. R. 124).

The cases cited by the appellant do not support her position that the evidence in this record (App. Brief, p. 11) justified the submission of "undue influence" to the jury. In *Frene et al. v. Muratori*, 79 U. S. App. D. C. 101, 142 Fed. (2d) 768, there was "strong and persuasive" evidence of fraud. In *Duckett v. Duckett*, 134 F. (2d) 527, 77 U. S. App. D. C. 303, there was evidence of false statements by the caveatee for the purpose of inducing hostility by the testator and in order to prevent the other relatives from visiting the testator.

In an analogous case, where a testator was separated from his wife six years prior to his death and he bequeathed his estate to a woman in whose house he lived

and who took care of him, this Court held there was insufficient evidence to go to the jury on the question of undue influence.

"The evidence discloses that deceased had some six years prior to his death separated from his wife, and during this period of time had lived in the home of appellant, who had taken care of him and nursed him in his illnesses and generally had been a companion to him, though the record does not disclose the details of their relationship. Nothing appears to show that appellant exercised any influence over deceased in the disposition of his property or that deceased was not himself perfectly capable of making such disposition as he desired. Nor are there, in any of the circumstances, inferences legitimately deducible which furnish any ground for the conclusion that undue influence was resorted to to accomplish an unjust end. In view of the complete failure of evidence in the respect mentioned, it was error to have submitted the question to the jury. See *Gibson v. Collins*, 55 App. D. C. 262, 4 F. (2d) 874, 878; *Conley v. Nailor*, 118 U. S. 127, 6 S. Ct. 1001, 30 L. Ed. 112; *Beyer v. LeFevre*, 186 U. S. 114, 22 S. Ct. 765, 46 L. Ed. 1080. This makes it our duty to reverse and remand for a new trial." (*Simpkins v. McDermott*, 79 Fed. (2d) at pages 711, 712.)

CONCLUSION

The appellant having failed to put in issue or sustain the burden of proof on the issue of testamentary capacity and there being no evidence to justify the claim of undue influence the Court below properly directed a verdict on the framed issues for the appellee and such ruling should be sustained.

Respectfully submitted,

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